

accumulated by one entity have long been recognized as effective means to curb undue concentration in holdings. See National Broadcasting Co., supra (upholding regulation prohibiting network ownership of more than one broadcast station in a service area); Storer Broadcasting, supra (upholding regulation limiting number of broadcast licenses that any one person could acquire). Even without the explicit authorization in Section 309(j)(3)(B) to disseminate licenses broadly, the FCC would have had authority to promulgate the caps under 47 U.S.C. 303, which delegates to it the responsibility to regulate communications licensing in the "public convenience, interest, or necessity." The spectrum caps, like other cross-ownership rules that have been upheld by this Court, have been found by the FCC to "serve[] the public interest * * * by preventing undue concentration of economic power." NCCB, 436 U.S. at 780.

The spectrum cap is well supported by the administrative record. The FCC had before it compelling evidence that the existing cellular market was not competitive. The FCC also was aware that cellular carriers had a significant head start over competitors in customers, physical infrastructure, and technical expertise. See In the Matter of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 F.C.C. Rcd 4957, 4983 (1994); NPRM, 7 F.C.C. Rcd at 5702-5703. That evidence strongly indicated that, unless the FCC capped the amount of spectrum that a cellular company could hold, cellular companies could quickly move to gain control

of PCS and throttle competition at the birth of the market. The judgment that led the FCC to promulgate the spectrum cap is a classic example of the kind of prediction that Congress generally places within the purview of an agency, subject only to very limited review by the courts. When the FCC makes "factual determinations * * * primarily of a judgmental or predictive nature, * * * a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." NCCB, 438 U.S. at 813-814.

Finally, the FCC did not arbitrarily discriminate between cellular operators and operators of SMR services when it made cellular operators, but not SMR licensees, ineligible to bid for 30 MHz PCS blocks. Holders of SMR licenses are not in a situation comparable to that of cellular licensees. Until this year, SMR services have been used mainly for taxi dispatch services, and SMR licensees do not have an entrenched market position in the wireless telephone market. In the Matter of Regulatory Treatment of Mobile Services, Second Report and Order, 9 F.C.C. Rcd 1411, 1408-1409 (1994). Furthermore, the SMR spectrum is divided into blocks of 10 MHz or less and thus is inherently different from the 25 MHz of spectrum held by cellular licensees. SMR operators are also subject to a spectrum cap on combined PCS, cellular, and SMR spectrum of 45 MHz. See In the Matter of Regulatory Treatment of Mobile Services, Third Report and Order, 9 F.C.C. Rcd 7988, 8100 (1994). Thus, if Radiofone

were an SMR operator, it still could not obtain a 30 MHz PCS license in addition to its 25 MHz cellular license.

3. Unless the stay is dissolved, prospective bidders for PCS licenses, the government, consumers, and the public interest will all suffer irreparable harm. Every one of the would-be C block bidders is a small business, and many of them are run by people who have left their jobs, hired staff, and rented office space in anticipation of the C block auction. For example, DCR Communications has spent more than \$4 million preparing for the auction, and all of its 25 employees gave up other jobs to prepare for the auction. See Riker Affidavit ¶ 5 (App., infra, 5).

The cost of delay to prospective bidders, which must continue to pay salaries, rents, and other expenses while the auction is on hold, is enormous. Even a short delay at this point may be fatal to many companies, eliminating them entirely from participation not only in the C block, but from any participation at all in wireless communications. Small business bidders must secure substantial financing to participate in the auction, and much of that money will come from investors who have already become nervous as a result of the "continuing legal disruptions of this auction." Riker Affidavit ¶ 7 (App., infra, 5). With respect to the Omnipoint stay, the chief financial officer of one prospective bidder reported that "[t]he uncertainty and delay caused by this stay is driving away prospective investment and causing the cancellation of conditional

investor commitment." Affidavit of Lance C. Cawley ¶ 4 (App., infra, 16). Another participant in the Omnipoint case, QTEL Wireless, Inc., reported that its investors "pulled out of the deal" because "any delay in the process leaves investment capital idle and the investors looking for more viable alternatives in which to invest their money." Affidavit of Q.T. Kenan ¶¶ 10, 11 (App. infra, 19-20).

Further delay of the auction will likely cause more investors to withdraw their support, leaving many companies unable to participate in the auction or in the wireless industry. And because delay will shut out many companies from the auction for lack of economic opportunity, it will also seriously temper the vigor of the auction, for with fewer participants, the auction is less likely to be characterized by robust bidding. Even after the auction is held, the eventual C block licensees will enter the wireless market a decade behind cellular carriers such as Radiofone and, as the delay persists, significantly behind the A and B block licensees. As stated by the managing director of the Toronto-Dominion Bank, the world's largest lender to the wireless telephone industry, "[a] late entrant in the wireless phone business -- especially the small businesses such as Congress intended for the C block licenses -- will have difficulty competing against up to four well entrenched competitors." App., infra, 7.

The FCC responded to these concerns when it expeditiously deleted its race and gender-based measures to avoid any delay

that would be engendered by legal challenges to those provisions. The FCC then concluded that "[a]ll C block applicants, as well as the public, will be better served if we proceed expeditiously" with the auction. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Sixth Report and Order, FCC 95-301, ¶ 16 (July 18, 1995) (App, infra, 31). Nothing in the record justifies the court of appeals' substitution of its judgment for that of the FCC on need for expedition.

The stay will also cause fiscal harm to the federal government, for the stay, with its deleterious impact on competition, permanently reduces the value of C block licenses. It has been reasonably estimated that the C block auction will generate nearly \$4 billion for the federal treasury. (The A and B blocks generated nearly \$4 billion each.) The daily interest cost of delaying receipt of the money is \$840,000. Moreover, the passage of time increases the difficulty faced by C block licensees in competing with entrenched cellular, A block, and B block incumbents. Hence, a delay in the auction of even 60 to 90 days will result in a decline in the value of the licenses -- and therefore the amount of money collected by the United States -- of between \$385 and \$577 million. See Affidavit of Stephen C. Hillard ¶¶ 6, 7 (App., infra, 10-11). That amounts to a loss of an additional \$6 million per day.

The Sixth Circuit therefore seriously erred when it (apparently) concluded that the stay would do nothing more than

preserve the status quo. The stay effectively eliminates many would-be participants from the auction process by increasing their ongoing expenses and delaying their eventual participation in the income-generating PCS business. Simply by delaying the auction, the stay gives an unfair advantage to cellular incumbents in the overall market for wireless communications services and harms consumers by restricting their options in that market.

4. Radiofone, by contrast, will not suffer harm in the absence of a stay. The Sixth Circuit apparently believed that, once the C block auction is held and the licenses are issued, Radiofone would be without meaningful relief. That is incorrect, for the court of appeals could order appropriate relief even after the auction. If the court strikes down the spectrum cap, it could order the FCC to re-auction the three licenses on which Radiofone was not permitted to bid. Radiofone would then get full relief. Meanwhile, the court of appeals could make clear that any bidder for the three licenses Radiofone seeks should be on notice that a re-auction could be ordered.

Alternatively, the court of appeals could permit Radiofone to bid for those three licenses (subject to re-auction if the caps are upheld) and thus permit the auction of all 493 licenses to go forward. Since Radiofone is not affected by the spectrum cap anywhere outside its cellular service area, there is no basis for a nationwide injunction of all of the auctions. See United States Dep't of Defense v. Meinhold, 114 S. Ct. 374 (1993)

(staying nationwide injunction entered by district court, and confining injunction's application to benefit of single named plaintiff); cf. United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1018 (1995) ("[R]elief should be limited to the parties before the Court.").

CONCLUSION

The stay entered by the court of appeals should be vacated.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM E. KENNARD
General Counsel
Federal Communications
Commission

OCTOBER 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 18 1995

LEONARD GREEN, Clerk

CINCINNATI BELL TELEPHONE CO.)
(Nos. 94-3701, 95-3023); BELL SOUTH)
CORPORATION (Nos. 94-4113, 95-3315);)
and RADIOFONE, INC., (No. 95-3238),)

Petitioners)

v.)

ORDER

FEDERAL COMMUNICATIONS COMMISSION)
and THE UNITED STATES OF AMERICA.)

Respondents.)

Before: MARTIN and BATCHELDER, Circuit Judges; and EDMUNDS, District Judge.*

In these cases, the petitioners challenge various aspects of 47 C.F.R. § 24.204, a rule promulgated by the Federal Communications Commission, which restricts the ability of certain entities currently operating cellular services to bid on licenses for a new wireless communications technology called "Personal Communications Services." The FCC is presently undertaking an auction of such C Block licenses. A prior auction of A and B Blocks has been completed, and the licenses awarded under those auctions have been issued. Oral argument was held in these petitions for review on October 10, 1995. At that hearing, petitioner Radiofone orally renewed its motion for a stay of agency action regarding the C Block auction pending the decision in this case.

*The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

Having heard oral argument in this matter, we believe a stay of agency action is necessary and proper to ensure that the status quo remains and to avoid issues of mootness pending our decision. In evaluating requests to enjoin agency action, four factors are relevant. They are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent relief; 3) whether issuance of an injunction will substantially injure the other interested parties; and 4) where the public interest lies. *State of Ohio, ex rel Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987); *see also Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The panel has reviewed these factors and has concluded that a stay should issue.

In view of the above, it is **ORDERED** that the FCC is stayed from taking any action in furtherance of the C Block auction pending further order of this court, including, but not limited to, issuance of any public notices other than to advise of this order, acceptance of any bid applications, and review and/or award of licenses within this block.

ENTERED BY ORDER OF THE COURT


Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

FILED

OCT 20 1995

CINCINNATI BELL TELEPHONE COMPANY;

Petitioner

LEONARD GREEN, Clerk

UNITED STATES TELEPHONE ASSOCIATION; THE RURAL CELLULAR
ASSOCIATION; U S WEST, INC.; BELL SOUTH CORPORATION;
BELL SOUTH TELECOMMUNICATIONS, INC.; BELL SOUTH ENTERPRISES,
INC.; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY

Intervenors

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA;

Respondents

PACIFIC BELL; NEVADA BELL; MCI TELECOMMUNICATIONS
CORPORATION; PACIFIC TELESIS MOBILE SERVICES; PACIFIC BELL
MOBILE SERVICES


Intervenors

BEFORE: MARTIN and BATCHELDER, Circuit Judges; EDMUNDS, District Judge

Upon consideration of the emergency motion for reconsideration
filed by the FCC,

It is **ORDERED** that the motion for reconsideration is
DENIED.

ENTERED BY ORDER OF THE COURT


Leonard Green, Clerk

AFFIDAVIT

CITY OF WASHINGTON)

)SS:

DISTRICT OF COLUMBIA)

I, Janis A. Riker, being first duly sworn, depose and state as follows:

1. I am President, Chief Operating Officer and a member of the board of directors of DCR Communications, Inc. ("DCR"). I have personal knowledge of the matters set forth herein.

2. DCR was incorporated in Maryland in April, 1994 but has its principal offices in the District of Columbia. DCR was formed by Daniel C. Riker and Janis A. Riker to bid on PCS licenses to be auctioned by the FCC and to build and operate PCS systems. DCR has no business revenues to date and total assets of less than \$500 million, and qualifies to bid as a "small business" in the FCC Block C PCS auction and intends to do so. Furthermore, DCR's "control group," as defined in the FCC rules, holds a majority of the voting stock of the Company and more than 25% of its equity. A majority of the voting stock of the control group is held by Teleconsult, Inc., a minority-controlled corporation, and by myself. Thus, DCR meets the FCC's requirements as a minority/woman controlled small business.

3. DCR has been an active participant during the past year in PCS proceedings at the FCC. We have filed written comments at various times and have made presentations to members of the FCC staff, as well as to FCC Commissioners.

4. Since its inception, DCR has been seeking investment to build a corporate organization and to bid for and win licenses in the C Block auction. Raising investment for PCS has proven to be extremely difficult. DCR has had some success in raising equity investment and, at the time the Omnipoint stay was granted, was close to obtaining substantial additional equity investment, all of which would have positioned DCR to bid for markets well in excess of 100 million in population. In addition, DCR has executed comprehensive supply agreements with equipment vendors, Ericsson, Inc. and Nortel, for \$1 billion in PCS equipment, engineering and construction services, sufficient to completely build out markets totaling nearly 70 million in population. Since the grant of the Omnipoint stay, investor interest has diminished substantially, and we have not closed any additional investment deals.

5. DCR has spent more than \$4 million in preparation of the FCC C Block auction. DCR has incurred substantial expense in acquiring computers and software to manage and analyze the bidding, as well as for consultants and contractors to do research and analysis and to provide specialized expertise to the Company. Some of these services were time-sensitive and will have to be repeated when the auction is rescheduled. In addition, the Company has 25 full-time salaried personnel and six full-time contractors. The Company leases 15,000 square feet of office space in Washington, DC. Several of DCR's employees and their families were relocated from other cities. All of our employees have given up other jobs to join us and all are at risk because of this delay.

6. In anticipation of post-auction requirements, the Company was in the process of expanding and was actively recruiting additional personnel when Omnipoint's request for a stay was granted. During the next two years, the Company expects to hire approximately 1,500 personnel. The hiring of additional personnel has been halted as result of the stay.

7. Currently, the Company's monthly operating expenses are approximately \$500,000. This stay has increased our legal expenses substantially. The Company raised sufficient working capital to support operating expenditures through the length of time the auction was expected to take prior to the current stay. However, most of DCR's committed equity investment cannot be used for working capital. It can only be used to purchase licenses in the auction, if there is one. Thus, DCR must operate on high-risk working capital investments that were obtained earlier this year, prior to the delays that have occurred. The Omnipoint stay requires that we have more working capital than we expected to have and the existence of the stay makes it extremely difficult to obtain any new working capital investment. Most investors have become extremely uneasy about the continuing legal disruptions of this auction. We were notified on Monday, Aug. 14 by a prospective investor we were counting on to provide us with additional working capital, that they would not make their working capital investment until the auction is rescheduled. The current delay in the auction, caused by the stay granted by this Court, places DCR in considerable financial jeopardy and could result in DCR being financially unable to participate in the auction when, and if, it occurs.

8. Because DCR is a woman/minority-controlled small business and qualified as such under the original FCC rules, we were eligible to use the 49% investment option prior to the rules adopted by the FCC in the Sixth Report and Order. However, we did not find this to be a very desirable option and there was very little investor interest in such an option. We chose the other investment structure option, under which no investor can own more than 25% equity without

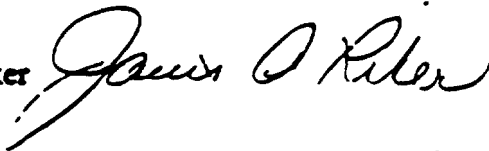
tribution. We found this to be a much more practical and realistic structure and much more likely to attract investment than the 49% option. Despite the fact that the 49% investment option has been available to minority and women-controlled firms for more than a year, we understand that very few have employed it to date. We know of only two other potential bidders, Wisconsin Wireless and Cook Inlet, that structured themselves with 49% investors and one of those, Wisconsin Wireless, structured its investment transaction after the issuance of the Sixth Report and Order.

9. We were an active commenter before the FCC as to how to structure the auction post-Adarand, so that it was race and gender neutral. Although we are fully qualified as a minority/woman controlled company, we strongly advocated the extension of benefits originally designed for minority and women controlled companies to all small businesses. We also urged the FCC to act quickly so that as little precious time as possible was lost. Continued delays in the C block auction not only undermine our ability to attract capital, but also such delays give the winners of the A and B block auctions an even greater head start.

10. The new delay in the Block C auction has caused us to lose a substantial amount of money that may be impossible to replenish. While we have received significant investment commitments for the auction, we are a small company without the resources of a major operating company necessary to sustain a lengthy delay. It is urgent that this stay be lifted and the auction rescheduled so that we are able to participate. This stay threatens not only the jobs of people currently employed, but lessens the potential for the creation of thousands of jobs in the future. This stay also is likely to cost the government hundreds of millions of dollars in lost auction revenue because small companies are unable to survive a lengthy delay.

The facts stated herein are true and accurate to the best of my knowledge and belief.

Janis A. Riker



Sworn to before me this 15th day of August, 1995


Notary Public

My commission expires:

My Commission Expires September 14, 1995

TD

THE TORONTO-DOMINION BANK

U.S.A. Division
31 West 52nd Street
New York, N.Y. 10019-6101

Telephone No. (212) 468-0740
Fax: (212) 262-1928

Via Facsimile - (303) 443-5765

August 8, 1995

Mr. Steve Hillard
Vice President
Cocke Inlet Communications, Inc.
1966 13th Street, Ste. 280
Boulder, CO 80306

Dear Steve:

You have asked for our views of the negative effects of further delays of the Federal C block Personal Communications System (PCS) auction. As you know, Toronto Dominion Bank is the world's largest lender to the wireless telephone industry and has more than \$1 billion in credits to this industry, including loans to many of its principal players. Many of these companies already own their cellular telephone licenses and/or A or B block PCS licenses. From this vantage point, we are cognizant of the business and market conditions, plans, risks and opportunities in this industry.

In a letter we sent to the Federal Communications Commission on May 23, 1995, we voiced our concern over the ability of PCS Designated Entry licensees to gain favorable financing because of certain issues surrounding the terms of such licenses. Similarly, we believe that the delays in the C block licensing process will have two clear and unavoidable consequences: (1) a decline in the value of the business enterprises utilizing the C block licenses (and hence a decline in auction revenues to the Federal Treasury), and (2) diminished competition in the industry. We believe that it will be difficult, if not impossible, for the effects of this to be "made up" later.

A late entrance in the wireless phone business - especially the small businesses such as Congress intended for the C block licenses - will have difficulty competing against up to four well entrenched competitors. The business case for such C block licenses becomes more difficult with the passage of time - which in turn means an erosion in value for the C block, less capital attracted to the C block auction, less markets actually built-out and less money collected by the Federal government. If the delays continue, at some point, we believe, the value of the C block will start to drop off radically.

We understand that the Federal government originally proposed revenues at \$2 to \$3 billion for the C block licenses. We believe that the current delays may materially jeopardize that estimate.

Sincerely,

Brian A. Rich

Brian A. Rich
Managing Director

BAR/cmb

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QTEL WIRELESS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

THE UNITED STATES OF AMERICA

Respondents.

Case No. 95-1391

AFFIDAVIT OF STEPHEN C. HILLARD

Affiant, being duly deposed and under oath, hereby alleges and avers as follows:

1. I am Vice President and Chief Operating Officer of Cook Inlet Communications, Inc. (CICI), a wholly-owned subsidiary of Cook Inlet Region, Inc. (CIRI).
2. CIRI, an Alaska Native Regional Corporation, is owned by 6700 Native Americans of Athabaskan, Eskimo, Aleut, Haida and Tlingit descent and has its headquarters in Anchorage, Alaska.
3. In the course of developing a business plan for the Personal Communications Services (PCS) spectrum auction over the past two years, CICI conferred at length with scores of potential debt and equity partners, including most of the

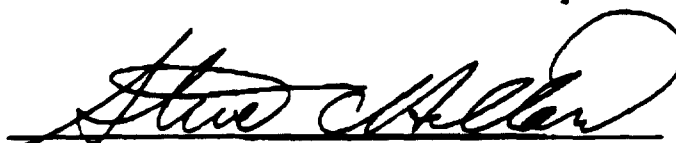
major telephony operating companies in the United States, the principal equipment manufacturers (who, in effect, operate also as lenders to the industry), and the largest conventional lenders (e.g. banks) and equity investors to the telecommunications industry. Accordingly, CICI has a practical and current familiarity with the financing, partnering and business aspects of PCS.

4. Scores, and perhaps hundreds, of small businesses, including CICI, have been working hard to participate in the C block auction. These businesses are being substantially and irreparably harmed by further delay in the C block auction. The A and B block auction winners, including Omnipoint in the New York MTA, already have a very substantial competitive head start. These bigger A and B block properties have significant, built-in competitive advantages over the C block licenses in terms of size, speed of market entry, brand name resource and efficiencies of scale. The projected returns on PCS investments in the C block are already thin and high risk. The single greatest variable in PCS business plans is time to market. Ninety or even thirty days has a material negative effect. Further delays will, I believe, cause many more existing small businesses to drop out and/or lose their financing as Qtel has lost its financing according to the affidavit of its President. In light of the auction delays so far, a number of major telephony players (PrimeCo and WirelessCo for example) have indicated that they do not intend to partner with any small businesses in the C block auction.

5. Our business judgment is that every day of delay has an increasingly negative multiplier effect. Time lost before the A and B block auctions were held and the A and B block licenses were issued was less critical. Time lost now – when the A and B block competitors already have their licenses and are commencing their build-outs – means a much greater loss of projected revenue for a C block operator in the future. Also, as a practical matter, time lost now invariably means even more time lost at the "other end" – i.e., in getting the auction date re-set, getting the auction going, getting licenses issued, and completing the administrative process. Accordingly, we believe a decline in value of 3% to 5% every thirty days of current delay is a reasonable estimate. That means that the delay caused by the current Omnipoint stay already probably has cost sixty to ninety days delay. This means the federal government is facing a 10% to 15% loss in auction revenues for the C block licenses due to such delay. Further delays will increase that loss.
6. Estimates for the revenues from the C block auction are generally in the billions of dollars range. The A and B block auction brought in \$7.7 billion nationwide. The C block auction (covering the same national footprint) would logically generate half of that number, or \$3.85 billion. Even a 10% to 15% loss based on this number would mean a loss to the federal treasury of between \$385 million and \$577 million.

7. Moreover, assuming the full projected federal revenue of \$3.85 billion for the C block licenses, the cost of delay to the United States calculated at the current federal borrowing rate of 8%, is over \$840,000 per day.
8. Translating the above delays to CICI's business plan, we estimate CICI has lost an amount in excess of \$5 million of current value due to this delay so far.
9. The conclusion that further delay will very seriously impact the federal Treasury, reduce prospects for competition, and injure the numerous C block prospective bidders, is shared generally by the wireless telephone industry, including the principal provider of credit to the industry. See attached letter from Toronto-Dominion Bank, dated August 8, 1995.

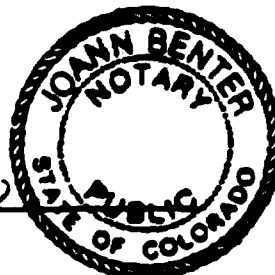
The facts stated herein are true and accurate to the best of my knowledge and belief.



Stephen C. Hillard

Sworn to before me this
9th day of August, 1995.


Notary Public



My Commission Expires: 7-11-98

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Litigation Division
Office of General Counsel

No. 95-1374

September Term, 1995

Omnipoint Corporation,

Petitioner

v.

Federal Communications Commission
and United States of America,

Respondents

GO Communications Corporation, *et al.*,

Intervenors

and Consolidated Cases 95-1391, 95-1409, and 95-1412

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED

SEP 28 1995

CLERK

Petitions for Review of an Order of the
Federal Communications Commission

Before: Edwards, *Chief Judge*, Wald and Sentelle, *Circuit Judges*.

ORDER

Upon reconsideration of the motion to vacate the stay filed August 8, 1995, the opposition thereto filed August 14, 1995, and the reply filed August 15, 1995, it is

ORDERED that the motion be granted and the stay be dissolved. The auction may go forward. The court will issue an opinion at a later date.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By 
Deputy Clerk

Dissenting statement filed by *Circuit Judge Wald* is attached.

• I dissent from the Order dissolving the stay of the FCC's *Sixth Rule and Order*. In the *Fifth Report and Order* and *Fifth Memorandum Opinion and Order*, the FCC found that the unique needs of minority- and woman-owned businesses necessitated a different balance between access to capital and the threat that large, ineligible companies would take effective control of Block C licenses than the balance struck for all other eligible Block C applicants. Although I appreciate the FCC's need to reassess that original balance in light of *Adarand*, I do not believe the FCC has adequately explained why the apprehensions that led it to prohibit any single non-minority- or woman-owned business with assets over the Block C caps from owning more than a 25% equity option are not still compelling. Accordingly, I believe remand to the FCC on an expedited basis for an adequate explanation of the new balance it has struck in the *Sixth Rule and Order* is required.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

RADIOPHONE, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;)

Respondent.)

JUN 12 1995

LEONARD GREEN, Clerk

ORDER

Before: MARTIN and SILER, Circuit Judges; and JOINER, District Judge.*

In this appeal, which is consolidated with several others seeking similar relief, the petitioner, Radiophone, Inc., seeks review of decisions of the Federal Communications Commission which regulate licensing for personal communications services (PCS). Radiophone has filed an emergency motion for a stay pending appeal. Therein, it asks this court to enjoin the FCC from conducting an auction of available PCS licenses. Applications for that process are to be filed with the FCC by June 15, 1995, and the bidding commences August 2, 1995. In the alternative, Radiophone requests a writ of mandamus directing the FCC to rule upon a similar motion for stay pending before it. The FCC has responded in opposition to the motion for a stay.

*The Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

Fed. R. App. P. 18 generally requires requests for stay of an agency's action to initially be made to the agency. In this case, Radiophone has done so. The FCC has not ruled, but in fact has taken action inconsistent with the granting of a stay. We conclude, therefore, that the instant motion to stay is ripe for our consideration. See *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67 (7th Cir. 1983).

In evaluating requests for stay of agency action, four factors are relevant. They are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *State of Ohio, ex rel Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987); see also *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Having considered the motion in light of these factors, and especially noting the possible injuries to other parties and the public interest, we conclude that the relief requested by Radiophone must be denied.

Therefore, it is **ORDERED** that the motion for a stay pending appeal, or, in the alternative for a writ of mandamus, is denied. However, the FCC is directed to give notice of the pending petitions for review of the cellular prohibition rule, 47 C.F.R. § 24.204, to all persons who make initial applications to participate in the auction that may be affected should the petitioners prevail.

ENTERED BY ORDER OF THE COURT


Clerk

DECLARATION OF LANCE C. CAWLEY

I, Lance C. Cawley, hereby declare as follows:

1. I am the Chief Financial Officer of GO Communications Corporation ("GO"). GO, a Delaware Corporation, is small business formed in February 1994 to participate in the F.C.C. auctions of broadband PCS spectrum.

2. GO intends to win 30MHz PCS licenses in the FCC's "C Block" Auction and join with other licensees to create a national alliance of PCS operators. I have personally developed GO's business plan and have been responsible for financial strategy, planning and analysis as part of GO's fund raising efforts for the PCS auctions. As part of my responsibilities I am expert in the valuation of spectrum licenses for communications services and have extensive knowledge of wireless telecommunications.

3. On balance I have over 10 years work experience in the financial services and the telecommunications industry, with particular expertise in wireless telecommunications finance and strategic business planning. Prior to the formation of GO, I served as Vice President for the Schelle Cellular Group Inc. which specialized in establishing and operating wireless communications companies. In that capacity I was involved in business planning, valuation and analysis for numerous wireless communications ventures, enterprises and companies. Prior to that I was an officer in the Communications Lending Division of the First National Bank of Maryland responsible for a portfolio of cellular, cable, broadcasting and paging loans.

4. As part of my participation in the fundraising efforts for GO, I am aware that the current stay of the "C Block" auction has caused immeasurable damage to GO's ability to raise both debt and equity financing. The uncertainty and delay caused by this stay is driving away prospective investment and causing the cancellation of conditional investor commitment. Furthermore based on my experience and knowledge of the PCS industry, I am aware that most similarly situated companies planning to participate in the C band auction are suffering similar harm in their fundraising efforts. Investors already skeptical of the abilities of small C block companies to compete against the dominant telecommunications companies that won the A and B block licenses now question the viability of the auction itself. Unless the stay is lifted, the industry will lose hundreds of millions of dollars of investment and countless new competitors that had planned to participate in the C block auction will be foreclosed from this once promising opportunity.

5. In addition to the loss of investment opportunity and failure of many businesses, delay resulting from this stay causes quantifiable damage to the value of the PCS licenses and ultimately the licensee businesses due to lost market share and revenues into the foreseeable future. Based upon GO's current business model every week of delay causes the company to lose value of between \$2,000,000 and \$3,000,000. On an industry basis every week of delay of the C block auction is causing a loss in value of between \$13,000,000 and \$25,000,000.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of August, 1995.

A handwritten signature in black ink, appearing to read "Lance Cawley", written over a horizontal line.

Lance C. Cawley